No. 21689

In the

United States Court of Appeals

for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

HARRAH'S CLUB,
Respondent.

Brief for Respondent

SEVERSON, WERSON, BERKE & BULL
NATHAN R. BERKE
433 California Street
San Francisco, California 94104
Attorneys for Respondent

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

SUBJECT INDEX

STATUTES

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INTRODUCTION AND ISSUES PRESENTED

This case presents a classic example of a lengthy and costly Board proceeding which never should have been brought to hearing under any objective standard. The shallowness of the Board's case is illustrated in the unduly prolix record made so by (1) constant interruptions throughout the hearing by the unreasonable demands of the General Counsel's representative upon Respondent to prepare and produce records which he hoped would support his contentions and (2) repetitious questioning and cross-examination without limit by the General Counsel's representative. As the Trial Examiner observed, he had not tried a Board case where there was "so much trivia in

the General Counsel's case" and where there was "just scraping the bottom of the barrel to find something" to tie to an unfair labor practice. (Tr. 893-894)

The issues presented are:

1. Whether the Board should have reopened the record on Respondent's timely motion following this Court's decision in *NLRB v. Harrah's Club,* 362 F. 2d 245, to permit Respondent to introduce evidence to establish substantial prejudice by the Board's assertion of jurisdiction. We shall show that it should have. (*infra* I)

2. Whether the Board should have granted Respondent a hearing on its objections filed in the representation election proceedings which raised substantial and material issues of fact. We shall show that the Board should have set aside the election or, at least, granted a hearing on the objections. (*infra* II)

3. Whether the lay-off of Cole and Lovelady was discriminatory. We will clearly show that the lay-offs were occasioned solely by an economy program affecting all of the departments in Respondent's organization. (*infra* III)

4. Whether the enforcement of Respondent's policy against the acceptance of tokes (tips) by the stage crew from entertainers was discriminatory. We shall show Respondent had this policy long before the Union was ever in the picture and that the Board's findings and conclusions here, too, are without substantial support in the record. In addition, on this issue, we shall show as a matter of law that tokes are not a mandatory bargaining subject and they are not wages or terms and conditions of employment.

We shall also discuss the Board's remedy in this respect and show that it is unenforceable. (*infra* IV)

5. Whether there is substantial evidence for the Board's holding that there were such violations of the Act. We will see that the Board in making its findings used findings in another case not as background, but as evidence to make its findings and conclusions of discrimination. And that without the use of such other findings the Board's findings and conclusions in this case are completely lacking in evidentiary and legal support. We shall also discuss the evidence relating to the supervisory status of Lovelady. We shall on this score point out the evidence which establishes as a matter of fact and under the definition in the Act that he was a supervisor and, therefore, without the protection of the Act. (*infra* V)

6. Finally, we will discuss whether Respondent's offer of permanent full time employment to Cole and Lovelady after an opening developed, was a valid and unconditional one. The Trial Examiner found that it was and that Cole and Lovelady had rejected the offer. He concluded Respondent had properly fulfilled its obligation. The Board disagreed. We shall show the Trial Examiner's conclusion was correct and the Board was in error. (*infra* VI)

Questions pertaining to the lay-offs, the toke policy, the Board's refusal to set aside the election or grant a hearing on the objections and Lovelady's supervisory status can be analyzed intelligently only by reviewing the extensive record. We regret that for such reason and because of the Board's intransigent position and sketchy presentation, this brief, too, will be extensive. We trust it will prove helpful to the Court.

Argument

I.

THE BOARD ARBITRARILY REFUSED TO REOPEN THE RECORD AND RECEIVE EVIDENCE ON THE JURISDICTIONAL ISSUE

In a prior case involving Respondent, *N.L.R.B. v. Harrah's Club,* (C.A. 9, 1966) 362 F. 2d 425, this Court held that the Board could assert its jurisdiction over gaming. In so ruling, this Court said, at 427:

> "Assuming that the criteria applied by the Board in determining to exempt racetracks from regulation are equally applicable to gambling casinos in Nevada, this alone is not sufficient to establish that regulation of the gambling industry will result in unjust discrimination. It must also be shown that the gambling industry will be substantially prejudiced by Board regulation because racetracks are not similarly regulated . . ."

The opinion of this court was rendered on June 14, 1966. On June 20, 1966, Respondent filed a motion with the Board in the instant case to remand to the Trial Examiner and to reopen the record solely for the purpose of receiving evidence on the jurisdictional issue to establish substantial prejudice by reason of the Board's regulation of gaming and because it does not similarly regulate racetracks. The motion recited the nature of the evidence to be adduced. Such evidence included depositions to be taken of the secretary of the National Association of State Racing Commissioners, of officials of various racetracks which were named in the motion. The nature and purpose of the evidence was also stated in the motion. (R. 87-88) On July 18, 1966, without giving any reason therefor, the Board by order denied the motion "as lacking in merit." (R. 90)

It is to be noted that the Board did not deny the motion on any ground other than it lacked "merit". For the first time the Board argues in its brief that Respondent should

have come forward with its evidence at the hearing. (Br. 17) It will be remembered that this Court's decision had not yet come down when the hearing was held in 1965. (R. 45) Until this Court's decision, Respondent was unable to determine what would be required of it either by way of proof to establish "substantial prejudice" a phrase used for the first time by this Court or whether any proof at all would be necessary. As Chief Judge Chambers said at the argument, this matter of jurisdiction was very "fuzzy". When Respondent learned of this Court's view, it promptly filed its motion with the Board.

The Board further argues for the first time in its brief that the motion was properly denied because it did not state with particularity the evidence which was sought to be introduced. (Br. 17) Respondent in its motion referred to this Court's opinion in *N.L.R.B. v. Harrah's Club, supra,* and stated that such evidence "will bear upon the issue of jurisdiction and will be directed toward showing that the Board's assertion of jurisdiction over the gaming industry while declining to assert jurisdiction over racetracks is prejudicial to and in violation of the constitutional rights of the owners of the gaming industry." The Board at the time apparently had no trouble with knowing the nature and the purpose of such evidence or what it would prove. It did not deny the motion on any technical ground such as is now asserted for the first time. It denied it "as lacking in merit."

The decisions cited in the Board's brief are completely inapplicable. *NLRB v. Southern Bleachery & Print Works* (C.A. 4, 1958) 257 F.2d at 241, dealt with a situation where evidence completely in possession of the respondent was not adduced at a prior hearing, but was sought to be introduced at another hearing. The respondent in that case made

no request for an opportunity to produce such evidence in the prior case. The Board in upholding the Trial Examiner who had rejected the proferred evidence in the second case did so on the ground that "the offer was primarily an effort to reopen a question which had been decided by the Board at the representation hearing." *NLRB v. Tex-O-Kan Flour Mills Co.,* (C.A. 5, 1941) 122 F.2d 433, 442 involved a witness who had been subpoenaed but did not appear. Respondent in that case made no request for delay because of his absence. The Board there denied the respondent's subsequent motion to reopen the case to take his testimony.

Nor do the cases cited in the footnote in the Board's brief help the Court. (Br. 17, n. 18)

A case applicable is *Jacobsen v. NLRB* (C.A. 3, 1941) 120 F.2d 96, 100 in which there was sought to be adduced additional evidence on commerce (jurisdiction). The Board had refused to reopen the record and take additional testimony. Subsections 10(e) and (f) of the Act were construed on an application to the Court, in a review of the Board case, for leave to adduce additional evidence. The Court stated:

> "Subsection (e) provides, inter alia: 'If either party shall apply to the Court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board . . . the court may order such additional evidence to be taken before the Board.'

The court then states:

> "We conclude that upon petition for review of a final order of the Board either party may petition the

court for leave to adduce additional evidence upon any pertinent issue and the court may excuse the failure of the party to adduce such evidence if it is material and that there were reasonable grounds for the failure of the party to adduce it before the Board. In so holding we are not unmindful of the express provisions of subsection (c) which state that after hearing . . . in its discretion, the Board upon notice may take further testimony or hear argument . . . That subsection cannot limit the power of a court of appeals, acting pursuant to . . . subsections (e) and (f), to require the Board to take additional evidence . . ."

We hereby request the Court to order the Board, for the reasons given both to the Board and this Court, to reopen the record to take the evidence described in Respondent's motion to the Board. (R. 87-88) Clearly, such evidence is material.

II.

RESPONDENT SHOULD HAVE BEEN GRANTED A HEARING ON ITS OBJECTIONS TO ELECTION

A. The Background and the Facts Pertaining to the Board's Arbitrary Treatment of the Objections.

An election was conducted by the Board on October 14, 1963. Of the twelve eligible voters, eleven cast votes for the union, there were no votes against the union, and there was one challenged ballot. (GCX 2(d)) In its objections to the election, Respondent alleged that the union:

(1) Induced employees to vote for it by promising them

(a) back overtime pay alleged due;

(b) jobs in Las Vegas, Nevada, or in California;

(c) it would prevent Respondent from cutting the stage crew to less than its present complement of twelve men.

(2) Threatened to blacklist employees and prevent them from obtaining employment elsewhere under Union jurisdiction if they did not vote for the Union; and

(3) Waived its rules with respect to taking tests, paying initiation fees and other requirements and issued membership cards in the union to the employees on the condition that they vote for the union.

In its objections (1) and (2), Respondent identified the agents of the union engaged in such conduct as John A. Forde and Bob Wetherill.

An ex parte investigation was conducted by the Regional Director. On November 15, 1963, he issued his report on Respondent's objections. (GCX 2(e))

With respect to objection 1(a), the Regional Director reported that his investigation disclosed no evidence in support of this objection "other than purported conversations between rank and file employees which were reported to management officials." He did report there was evidence that the matter of overtime was discussed by officials of the Petitioner (Union) as an issue to be negotiated in the event the union was selected as the collective bargaining agent." However, he concluded that there was no evidence that "any union official promised to seek payment for back overtime as a condition of voting for the union, or otherwise."

With respect to objections 1(b) and (c), the Regional Director reported that Respondent presented evidence in support of said objections through conversations between rank and file employees with other employees but he stated that there was no evidence of such promises by officials or agents of the union.

With respect to objection 2, he reported that there was no evidence in support of this objection.

With respect to objection 3, the Regional Director reported that there was no evidence in support thereof. He

reported the investigation disclosed that no requirements regarding tests, initiation fees or other conditions of membership were in fact waived, although in some cases fees were arranged to be paid on installment which were in no way contingent upon voting for the union.

He further concluded that the objections did not raise substantial or material issues of fact and recommended that the Board overrule them and certify the Union as the collective bargaining agent.

Respondent filed with the Board timely exceptions to the Regional Director's report on objections and a brief in support of such exceptions. (GCX 2(f), RX 2 (rejected)) In its brief in support of exceptions, Respondent argued that the objections raised substantial and material issues of fact which, at a minimum, required a hearing.

In its *per curiam* decision and certification of representatives dated February 27, 1964, the Board adopted the findings and recommendations of the Regional Director. The evidence upon which the Regional Director relied was not before the Board. The Board in a footnote states: "The employer's exceptions raises [sic] no issues warranting a reversal of the Regional Director's findings." (GCX 2(g))

At the hearing before the Trial Examiner in the present matter, Respondent requested that the General Counsel produce all the affidavits taken by the Regional Director during the ex parte investigation of Respondent's objections to the election. (Tr. 5-6, 12-14) The General Counsel refused to produce on the grounds that Respondent was attempting to relitigate the representation case in an unfair labor practice proceeding. (Tr. 6-8, 14-15) Respondent pointed out to the Trial Examiner that the Trial Examiner was not bound by the Board's decision and that he himself could determine whether or not the objections raised sub-

stantial and material factual issues warranting a hearing. (Tr. 10) The Trial Examiner stated that he did not know whether he had "the authority to override what the Board has done" . . . that his hands would be tied" (Tr. 10); he was inclined to the view that he could not relitigate matters in the representation proceedings (Tr. 12); that he didn't thing he could "set aside their [the Board's] decision which resulted in the certification of the Union and a decision supporting the Regional Director." (Tr. 13)

As a consequence, Respondent offered in evidence affidavits in its possession which had been furnished to the Regional Director in support of its objections: Charles Morrow, RX 1(a); Robert J. Stirling, RX 1(b); Morton G. King, RX 1(c); Jacques A. Vogt, RX 1(d); Richard W. Lusiani, RX 1(e); Robert I. Brigham, RX 1(f). The Trial Examiner rejected these affidavits on the theory that he did "not have the authority to relitigate in the Complaint proceedings the issues that were properly before the Board in the representation case, and culminating in a decision by the Board in a direction of an election in 20-RC-5597." (Tr. 15)

Respondent then requested special permission of the Board to appeal from the Trial Examiner's ruling rejecting the affidavits proferred by Respondent, refusing to require the General Counsel to produce the affidavits demanded, and refusing to permit Respondent to litigate the issue of whether the Board should have set aside the election or at a minimum granted a hearing on the objections (R. 16, GCX 4(a)) In support thereof, Respondent filed a brief with the Board. By telegram, the Board denied this request. (R. 18, GCX 4(d))

Near the close of the hearing, the General Counsel finally submitted to Respondent the affidavits taken by the Re-

gional Director during the *ex parte* investigation of the objections. These, too, were offered by Respondent but rejected by the Trial Examiner for the same reasons initially given. (Tr. 1344-1346; RX 52 A-K)

In his decision, the Trial Examiner held that the objections "have already been considered and ruled upon by the Board", and that he was bound by the Board's determination. (R. 48, n. 4; R. 54, lines 36-47) Respondent excepted to this. (R. 69) In its Decision and Order, the Board affirmed the Trial Examiner. (R. 84)

B. The Evidence Which Warranted Setting Aside the Election or at a Minimum Required a Hearing.

1. OBJECTION 1(a).

In support of Objection 1(a) Respondent offered the affidavit of Justice L. Morrow, a kitchen steward for Respondent, an employee not in the unit and without any interest in the outcome of the election, and Robert I. Brigham, Director of Industrial Relations for Respondent. Morrow recounted a conversation with Larry Helderbrand, during which "Helderbrand said if we 'go union we will get all our back overtime pay' . . . Helderbrand did say that 'the union guaranteed' the foregoing 'if we go union.' . . . Helderbrand said, 'We have a written statement that is notarized . . . and we will get our back overtime . . .'" (RX 1(a); RX 52H) Brigham's affidavit tells of a conversation he had with Morrow during which Morrow repeated the substance of what Helderbrand told Morrow concerning the claimed overtime pay. In addition, a fact which is ignored by the Board in its brief, Brigham's affidavit explains that no overtime pay was due the employees. (RX 1(f))

The fallacy of the Board's position is readily apparent from its argument. As Respondent pointed out to the Board

in its brief in support of exceptions to the Regional Director's report on objections (RX 2 (rejected)), there were but a small number of employees in the unit involved—twelve in number. Union representatives had no problem contacting them and did so frequently for the purpose of influencing their votes. Indeed, Robert H. Wetherill was not only an employee in the unit, but also business representative for the Union. In his affidavit, Wetherill admits telling the employees "that the issue of backpay for overtime was something the Union, if it won the election, would negotiate about." (RX 52K) The Regional Director made no finding, nor could he, that there was or is back overtime pay due the employees.

Helderbrand, in his affidavit, did admit telling Morrow "that if the Union got in we would get the pay that was coming to us." Helderbrand did not deny telling Morrow that he had a written statement that was notarized and that they would get their back overtime. (RX 52C)

Thus, it is readily apparent, contrary to the terse conclusion of the Regional Director and the Board, based on this recitation alone, that there were substantial and material issues of fact that could best be resolved by a hearing. What the Board overlooks in its brief, as this Court must realize, is that the substantial and material issues of fact were resolved by the Regional Director by an *ex parte* crediting of witnesses. Respondent does not know whom the Regional Director or the Board chose to believe. However, in reading the Board's brief, at page 39, we must now assume that the Board is telling the Court that it chose to believe the statement of Helderbrand.

In *NLRB v. Capital Bakers, Inc.,* (C.A. 3, 1965) 351 F.2d 45, 50, the Court said:

". . . Yet all of the evidence upon which he [the Regional Director] relied is derived from statements which were not subject to cross-examination or confrontation or to any legal test for determining their use or weight as evidence."

At page 51, the Court continued:

". . . We are not concerned with the question of whether or not the evidence considered by the Regional Director is sufficient to support his finding, or whether the rejected evidence of respondent would overcome the findings; we are solely concerned with the fact that the offer and the findings raise a substantial conflict of fact which the Board's Rules and Regulations require to be determined by a hearing. If this was not apparent to the Board at any prior stage it became clearly apparent at the Trial Examiner's hearing. The circumstances compelled a hearing, at the very least, at this stage."

We have the statement of Wetherill, a representative of the union, that he told the employees that if the union won the election, the issue of backpay for overtime was something the union would negotiate about (RX 52K) Helderbrand admits that he did say if the Union got in they would get the pay that was coming to them. (RX 52C) Respondent wonders, as well might this Court, whether after a fair and impartial hearing with the opportunity to cross examine witnesses, if in fact this objection would not have been substantiated. For is not the word, "promise" the ultimate fact to be determined after an impartial hearing? One thing seems clear, the union did make promises, no matter how one looks at what was said, in order to influence and induce the employees to vote for the union.

In his report, the Regional Director, notwithstanding the affidavits of Wetherill and Helderbrand, found that

there was no evidence in support of objection 1(a), "other than purported conversations between rank and file employees which were reported to management officials." This contention found little favor in a recent decision by the United States Court of Appeals for the Fifth Circuit,—*Home Town Foods, Inc. v. NLRB* (1967) 379 F.2d 241, 244—which said:

> "we are not impressed with the argument that all coercive acts must be shown to be attributable to the union itself, rather than to the rank and file of its supporters. As the Board has once said, 'The important fact is that such conditions existed and that a free election is hereby rendered impossible.' Diamond State Poultry Co., 1953, 107 N.L.R.B. 3, 6."

In this instance, the Regional Director and the Board obviously ignored the Board's own approach towards representation elections as expressed in *General Shoe Corp.,* (1948) 77 NLRB 124, 126, where the Board stated that its function in election proceedings was to provide a laboratory in which an experiment may be conducted under conditions as nearly ideal as possible to determine the uninhibited desires of the employees.

As further stated by the Court in *Home Town Foods, Inc. v. NLRB, supra,* at page 244:

> "We are also of the opinion that substantial and material factual issues exist which make it necessary that the employer be given a hearing and an opportunity to establish his charges, including cross examination of the witnesses for the union. One of the important issues is the effect of the election and preelection practices of union supporters on the minds of the voters. The Courts have usually applied an objective test to determine whether interference with an election is sufficient to set it aside."

Also, *NLRB v. Trancoa Chemical Corporation,* (C.A. 1, 1962) 303 F.2d 456, 461.

2. OBJECTION 1(b).

Objection 1(b) was based upon the affidavits of Morrow and Morton G. King, a sound technician for Respondent. Morrow stated that Helderbrand said, "the union guaranteed that if they lost their job here, the union would put them to work the next day in Las Vegas, or California, or some TV station. . . . 'The union guaranteed' the foregoing 'if we go union.' . . . 'We have a written statement that is notarized—if we lose our job, we are guaranteed a job in Las Vegas or California or some TV station.' " (RX 1(a); RX 52H) Stage hand, Paul Jordan, told King that if anything happened to the crew at Harrah's, "We've got a job in Vegas." (RX 1(c))

Here again, although there is a conflict in the testimony, the Regional Director and the Board chose to credit the denials of Helderbrand and Jordan. (Br. pp. 40-41) This was done although Jordan in his affidavit, upon whom the Regional Director and the Board apparently relied, states: "We were told that if we wanted or had to leave Harrah's there was work available in Las Vegas." (RX 52E) The Regional Director's ostensible reason for recommending this objection be overruled was that there was "no evidence of promises of jobs in other areas by agents or officials of the petitioner." But see: *Home Town Foods, Inc. v. NLRB,* supra.

Neither the Regional Director nor the Board deigned to comment upon the affidavit of Technician Supervisor Jacques A. Vogt, a former member of other locals of the Union, wherein he stated:

> "The craft is controlled by the union and unless you are a member it is almost impossible to go to work . . . In so far as membership in IATSE is concerned, it is a closed shop. It is a father-son deal or if you know someone who is influential in the union and he intro-

duces you, you may get in. This union is in exclusive control of the hiring halls and you get your jobs solely through the halls." (RX 1(d))

3. OBJECTION 1(c).

Objection 1(c) is based upon the affidavits of Brigham, Morrow, and Food and Beverage Warehouse Supervisor Robert Stirling. Morrow stated that he was told by Helderbrand, "it is a cinch that none of us will lose our jobs now that the union is voted in." (RX 1(a); RX 52H) Brigham corroborated the information furnished to him by Morrow concerning Helderbrand's statements. Two or more other technicians, whose names Brigham could not recall, informed Brigham that the crew could not be cut and the union would see that it was maintained at twelve (12) men. (RX 1(f)) Stirling said that Paul Jordan told him the union said to him "that now he wouldn't have to worry about getting fired, we're protected." Asked by Stirling what was meant by protection, Jordan explained that the union said "that they couldn't be bumped from their jobs at Harrah's because seniority was based on length of membership in the local and even if a union member (who had been an IATSE member for a time longer than any of Harrah's employees) came in, he still couldn't bump them." (RX 1(b))

The Regional Director did not find that the above statements were not made, but he concluded that this objection, as were the others mentioned above, was "based upon alleged statements made by rank and file employees to other employees." (GCX 2(e), p. 2)

The Board in its brief to this Court goes even further. It argues that even though these statements were made, it does not chose to believe the witnesses presented by Re-

spondent because in its omnipotence it chooses to believe the union's witnesses. (Br. pp. 41-42) The sworn statements of Respondent's witnesses were taken by Board agents. Certainly, credibility raises a substantial and material issue of fact which cannot be resolved without a hearing. Particularly in view of the fact that although denying he had been promised by any union representative that if he voted for the union the union would guarantee Respondent would not be allowed to cut the stage crew, Jordan admitted that "this was discussed by the union as an item to negotiate about." (RX 52E)

4. OBJECTION 2.

Objection 2 is based upon the affidavits of Vogt and Brigham. Vogt stated he was told by Cole "that it was fine to have an education in a stage hand's job and to be able to work at the stage hand's job, but if you should ever leave Harrah's where else could you go to work. The craft is controlled by the union and unless you are a member it's almost impossible to go to work." (RX 1(d)) Brigham stated he was told by Ponts that "he had to vote for the union because he couldn't get a job anywhere else in this business without a card." (RX 1(f)) Brigham also stated he was told by Lovelady that "he had been convinced that he couldn't get any work anywhere in show business without an IATSE card." (RX 1(f))

The Regional Director found that there was no evidence to support this objection. (GCX 2(e), p. 3) The Board itself however, in its brief is caught on the horns of a dilemma. Until the General Counsel finally produced the affidavits of Cole, Lovelady and Ponts, Respondent had no knowledge of either their admissions or denials. The Board cannot honestly state there was no evidence to support this

objection. Instead, the Board in substance contends that an issue of credibility was raised and it chose to believe Cole, Lovelady and Ponts. (Br. pp. 42-43) This, in face of the fact that Cole admitted in his affidavit he told Vogt he voted for the union for a variety of reasons, "among which was the reason that I realized that Harrah's was probably the only place in the country that I could work without an IATSE card and some day I might want to work somewhere else and implied I would like to be an IATSE member." (RX 52B) Further, Ponts in his affidavit states, "It is and has been my feeling and view that in the theatre business—stage employees—you can't get a job without an IATSE card and you can't get an IATSE card without a stagehand's job." (RX 52J) From whom could Cole and Ponts derive such feeling and views if not the union? Could Respondent demonstrate any more clearly a substantial and material issue of fact that can only be resolved by a hearing?

5. OBJECTION 3.

Objection 3 is based upon the affidavit of entertainment manager Richard W. Lusiani (Dick Lane). Jordan told Lane that he had paid $61.00 for a union membership card, but that "Bob Wetherill had kept them [cards]), he hadn't given them to them yet." Lane stated that he inferred "from what Jordan said that the cards had been held in the union's possession pending the outcome of the election." (RX 1(e))

The Regional Director reported that the investigation disclosed "that no requirements regarding tests, initiation fees or other conditions of membership were in fact waived, although in some cases fees were arranged to be made by installment." (GCX 2(e), p. 3) The Regional Director did

not report that examinations were given. Neither does he refer to the fact that membership cards were issued in the names of the employees, but held by the union pending the outcome of the election. Neither does he report that this was not a fact. His report is completely silent on this.

The importance of possessing a membership card in the union was emphasized with sledge hammer effect by the union. The union had pointed out the necessity for membership in the union if the employees were to continue in the industry and wanted to work in other areas. They would have to be "a union member to work" in the industry elsewhere and it would be a good thing to have a union card. (Affidavit of Vogt, RX 1(d)) It had been made clear to the employees that seniority in the industry was based on *length of membership in the union* and not length of service for an employer. (Affidavits of Lane, RX 1(e); Stirling, RX 1(b))

Although the union's initiation fee was $100, membership cards were issued in the names of the employees for a down payment of $25, the remainder to be paid *after* the election. (Affidavits of Cole, RX 52B; Himinez, RX 52D; Jordan, RX 52E; Lovelady, RX 52G; Murray, RX 52I; Ponts, RX 52J; Wetherill, RX 52K)

Is there not here again present a substantial and material issue of fact? Had a hearing been held, in all probability it could have been demonstrated by cross-examination that the union waived its own rules and issued membership cards to the employees, for less than the full initiation fee, conditioned on their voting for the union in the election. Once again, however, when a question of credibility is involved, the Board in its brief resolves the question by crediting the *ex parte* statement of pro-union supporters rather than the evidence offered by Respondent. (Br. pp. 43-44)

In sum, had the Board and its agent, the Regional Director, viewed the objections and the statements in support thereof, in a completely objective manner, the conclusion would have been impelled that there were conflicts on material and substantial factual issues which at least, warranted a hearing.

C. The Board's Rules and Regulations and the Court Decisions Require a Hearing.

1. THE 8(a)(5) FINDING CANNOT STAND.

The Board's Rules and Regulations require a post election hearing where substantial and material factual issues exist which can be resolved only after a hearing. Section 102.69(c) and (e), 29 C.F.R. § 102.69(c) and (e).

As stated in *NLRB v. Bata Shoe Company,* (C.A. 4, 1967) 377 F.2d 821, at 825, cert. denied (1967) .... U.S. ...., 66 LRRM 2370:

> "Due process of law demands and the present Rules and Regulations of the Labor Board provide that where there is a substantial and material issue of fact relating to the validity of a representation election that a hearing be conducted *at some stage* of the administrative proceeding before the objecting party's rights can be affected by an enforcement order . . . To borrow the words of Judge Brown, writing for the Fifth Circuit, 'it is clear that § 8(a)(5) orders which rest on crucial factual determinations made after *ex parte* investigations and without a hearing cannot stand.' *NLRB v. Air Control Prods. of St. Petersburg, Inc.,* 335 F.2d 245, 249 . . ."

Respondent is equally aware of the policy of avoiding lengthy and unnecessary hearings to expeditiously resolve questions preliminary to the establishment of the bargaining relationship and of avoiding dilatory tactics by those disappointed in the election returns. Consequently, Respondent

has no cause to disagree with the cases cited in the Board's brief at pages 37-38. "But this policy cannot operate to deprive the employer of a hearing in circumstances where it is entitled thereto." *United States Rubber Company v. NLRB,* (C.A. 5, 1967) 373 F.2d 602, 607.

In *NLRB v. Poinsett Lumber & Mfg. Co.* (C.A. 4, 1955) 221 F.2d 121, 123, the Court said:

> "If a hearing had been held and the evidence had been taken and passed upon by the Board in the representation proceeding, the Board would not be required to go into the matter again in the absence of special circumstances showing that it was in the interest of justice that this be done; but the evidence has not been taken nor a hearing accorded the company at any time even though substantial questions affecting the validity of the election had unquestionably been raised by its exceptions. We think that it is entitled to a hearing at some stage of the proceedings so that it may produce the evidence upon which it relies for consideration by the Board and for consideration by this court in proceedings to enforce or set aside the Board's Order."

Similarly, *NLRB v. Lord Baltimore Press, Inc.,* (C.A. 4, 1962) 300 F.2d 671, 674.

The determination of whether substantial and material factual issues have been raised so as to necessitate a hearing is a question of law and ultimately a question for the courts. *NLRB v. Bata Shoe Company, supra,* at page 826.

Certification of the Union by the Board did not irrevocably seal it against review. "Altogether interlocutory—just a step in the enforcement proceedings—it was as a matter of law subject to vacation or revision at any time before the trial of the unfair labor practice complaint became final." *NLRB v. Lord Baltimore Press, Inc., supra,* at 674; *Pittsburg Plate Glass Co. v. NLRB,* (1941) 313 U.S. 146, 162, 61 S. Ct. 908, 917.

D. A Hearing Would Have Supported Respondent's Objections and Required the Election to Be Set Aside.

The material and substantial factual issues raised by Respondent's objections would have been established to the satisfaction of even the Board had a hearing been held. Under the Board's precedents, the promises and inducements set forth in Respondent's objections would have compelled the Board to set aside the election. *Labue Bros.,* 109 NLRB 1182, where the union made a preelection offer of free membership. *N.L.R.B. v. Gilmore Industries, Inc.,* (C.A. 6, 1965) 341 F.2d 240, denying enforcement of the Board's order and holding an election invalid where the union had made a preelection offer to waive the initiation fee in the event it won the election.

The Board has recognized its responsibility in the conduct of elections by pointing out in *Sewell Mfg. Co.,* (1962) 138 NLRB 66, 70 that:

> "Our function, as we see it, is to conduct elections in which the employees have the opportunity to cast their ballots for or against a labor organization in an atmosphere conducive to the sober and informed exercise of the franchise, free not only from interference, restraint, or coercion violative of the Act, but also from other elements which prevent or impede a reasoned choice."

The Court in *N.L.R.B. v. Gorbea, Perez & Morell, S. en C.* (C.A. 1, 1964) 328 F.2d 679, dealing with whether a union inducement vitiated an election, stated (680):

> "The question whether there is interference with the employees' freedom of choice is often subtle and difficult. However, we start with one simplifying principle, avoiding the necessity of making the often impossible determination of its actual impact in the particular instance, that an inducement normally is material if objectively it is likely to have an appreciable effect."

See also *Truck Drivers and Helpers, Local Union 568 v. N.L.R.B.,* (D.C.C.A., 1967) 379 F.2d 137, 145, ftn 15, in which the court citing *Gilmore Industries, Inc.* and *Gorbea, Perez & Morell, S. en. C,* both supra, said:

> "A union's promise of benefit may be as disruptive of free choice as a threat, and may exert no less restraining influence on that choice."

We submit that the inducements and promises of the union, viewed objectively, were likely to and did have an appreciable affect on the employees freedom of choice in the instant case. They also exerted a restraining influence on that choice. It is not essential there be proof that such inducements and promises in fact did affect the employees freedom of choice. The election must be set aside if the inducements and promises were likely to have such effect. *N.L.R.B. v. Gilmore Industries, Inc.* and *N.L.R.B. v. Gorbea, Perez & Morell, S. en C, supra.*

III.

THE LAYOFF OF COLE AND LOVELADY WAS NOT DISCRIMINATORY

A. Respondent's Economy Program.

Cole and Lovelady, members of the stage technicians crew at Respondent's Lake Tahoe operations, were laid off on March 5, 1964. There is no dispute that they were laid off in accordance with seniority. (R. 57, lines 1-3) As we shall show, the lay-offs came as a result of a cost reduction program in which Respondent was engaged.

In May or June, 1962, Respondent engaged the services of a professional management consultant firm to make a study of its operations, its costs, and to make recommendations for improvement and reductions in cost. (Tr. 546, 550-551) Just prior to September, 1962, the consultants

issued their first report and recommendation which resulted in a reorganization. (Tr. 529-530, 554) Subsequently in the latter part of 1963, pursuant to further recommendations of the consultants, Respondent's management committee directed the various departments to reduce personnel and costs. Budgeting for each department was instituted for the first time and wage ratio reports were also instituted and utilized to control costs and reduce personnel. (Tr. 528-530) The wage ratio reports are designed to control and improve efficiency by the measurement of man hours or percent of wages to the volume of sales. (RX 40; Tr. 844-848) Through these wage ratio reports budgets are forecast for each department. These forecasts are reviewed frequently. Those for the productive departments such as gaming are reviewed daily. Those for the non-productive departments such as entertainment are reviewed monthly. (Tr. 1156) They are reviewed to compare the projected man hours with the actual man hour to determine whether to revise the forecasts upward or downward depending on the trend for the fiscal year. (Tr. 1173)

The cost reduction program was concerned with better utilization of personnel and with whether there was overstaffing. (Tr. 1173-1174)

Early in 1963, Respondent began seriously to forecast budgets. Improvements were made in those departments where the most money could be saved at the very outset. The entertainment and advertising departments were the first where immediate savings could be effected. (Tr. 1138-1139, 1149-1150, 1153) As of July, 1963, based on the July, 1963, to June, 1964, forecast, Respondent knew how many shifts would be needed in the entertainment department. (Tr. 1157)

B. The Effect of the Cost Reduction on the Entertainment Department.

Vice-President France testified concerning the re-organization in the various departments under his supervision, including entertainment and advertising as a result of the study by the management consultants. With the introduction of new budgeting methods, the budget for the entertainment department was reduced for the fiscal year 1963-1964 as against the budget of the preceding fiscal year. A further reduction was made in the 1964-1965 budget. France's advertising budget was also substantially reduced during the same periods. (Tr. 944-947)

France instructed the entertainment director that after September, 1963, he was to hold entertainment booked for the lounge at Respondent's Lake Tahoe club to a maximum of four acts. In September, 1963, the acts in the lounge at Tahoe were reduced from seven to four. Whereas in the past, entertainment in the lounge had been on a twenty-four hour basis, it was reduced to a twelve hour period during the week and eighteen hours on weekends. (Tr. 947-948) Similarly, the hours of entertainment at the Reno club were reduced. (Tr. 536-537)

To further economize, France attempted to either eliminate or obtain a less expensive opening act for the South Shore Room. (Tr. 948, 981) Respondent attempted to eliminate the opening act wherever possible, particularly in situations where the show had two "strong" featured performers. (Tr. 980-981) This policy is continuing. France was able to persuade such leading entertainers as Sammy Davis, Jr., Eddie Fisher, Mitzi Gaynor and Kay Starr to eliminate an opening act. He also told featured performers to eliminate new costumes for the chorus line or else to assume the cost for these themselves. (Tr. 1033-1039, 1041-1043)

France further instructed his supervisors that he wanted a more efficient crew, economies effected with respect to the number of personnel in the stage crew, and a reduction in the props used on the stage. (Tr. 949, 952, 986) To further reduce costs, France determined that it was more economical to purchase some scenery used in a production rather than to rent it. (Tr. 951-952) Greater efficiency was effected by purchasing more lights for the stage so that the stage crew would "set up" for the shows faster. (Tr. 951, 987) In November, 1963, the chorus line was reduced in number from sixteen to twelve. This number has fluctuated since then because the size of the chorus line is dependent upon the type of production number. (Tr. 532-533, 949-951, 1001)

Instead of hiring four or five big name entertainers for its lounges as in the past, Respondent engaged only one or two such entertainers and less costly acts for its lounges at both Reno and Tahoe. (Tr. 535-538; 606-607) Previously, productions in the South Shore Room at Tahoe were changed every two weeks. Under the cost reduction program, a production is now carried over from show to show. Lavish sets in this room have also been done away with. (Tr. 537-539)

Another cost reduction was achieved in the entertainment department when Stage Manager Sy Lein was terminated in the latter part of 1963. Arthur Barkow assumed both the position of producer and stage manager until about August, 1964. When Entertainment Director Vincent quit, Lounge Manager Lane assumed the position of entertainment director as well as that of lounge manager. (Tr. 922-925) The consolidation of these jobs resulted in a savings for the period that the stage manager's job was unfilled (Tr. 1043-1044), and a further saving in that Lane was still handling both positions as of the time of the hearing. (Tr. 923-924)

As a result of either eliminating or obtaining a less expensive opening act, in addition to the cost factor, Respondent has been able to save on rehearsals, lighting, cues, and other duties performed by stage technicians. (Tr. 1034-1035)

C. The Facts as to the Layoff of Cole and Lovelady.

1. COLE.

On January 16, 1964, Cole was called into Producer Barkow's office. Director of Entertainment Vincent was also present. As testified by Cole, he was informed a general cutback was taking place throughout Respondent's organization, and since he had the least seniority among the stage technicians, he would be the first to be laid off. He was assured by both Barkow and Vincent that the lay-off had nothing to do with his work and that he would be called back when needed. (R. 56, lines 39-43; Tr. 151-152, 173-174)

Cole requested a Board of Review with respect to his lay-off. The Board of Review met on January 19, 1964. The Board consisted of Assistant Club Manager Clever, Director of Industrial Relations Brigham, and Lovelady, the employee representative. It was the unanimous decision of the Board that Cole had the least seniority and he was the "proper man" to be laid off. (Tr. 733-734) Lovelady corroborated the fact that the Board of Review determined there was no need for Cole's services, that Respondent could do with one less stage technician and that Cole was the lowest man in seniority. (Tr. 71-73)

After being laid off, Cole was recalled a week later for temporary work lasting one day. He was again called back for temporary work on February 7, 1964. He worked for four weeks on that occasion during which he received approximately $1,000.00. That work ended on March 5, 1964, which was the last time he worked for Respondent. (R. 56, lines 39-48; Tr. 152-154, 166)

2. LOVELADY.

Lovelady was laid off by Producer Barkow on March 5, 1964. This was the same date on which Cole last worked in temporary employment for Respondent. (R. 57, lines 1-3) As Lovelady testified, he was assured by Barkow that the lay-off had nothing to do with his union activities or his ability to handle the job. He was informed by Barkow of the general cutback taking place throughout Respondent's organization. Barkow stated "since you are a low man in seniority you are the next man to go." Lovelady was also informed by Barkow that he would be called back when his services were needed. (Tr. 67-69; 98-99)

After the lay-off, Lovelady was also offered temporary employment on several occasions by Respondent, which he refused. (GCX 5, 6; RX 5; Tr. 83-84; 99-100)

D. The Cost Reduction Program Cut Across All of Respondent's Operations.

As part of its cost reduction drive, in November, 1963, Respondent's management committee discussed closing Respondent's Grand Cafe in Reno. In December, 1963, it was closed. As a result of the closing, some employees were terminated and some were offered jobs in Respondent's Casino Restaurant. (Tr. 531)

In the latter part of 1963, or the first part of 1964, a secretarial and stenographic pool was created for the first time at Respondent's Lake Tahoe operations. This resulted in the termination of some secretaries. (Tr. 531-532, 954)

As previously mentioned, entertainment in the lounge at the Lake Tahoe club was drastically curtailed. This resulted in the termination of cocktail waitresses in the lounge. They are employees of the Food and Beverage Department. (Tr. 606-607)

In the latter part of 1963, the number of automobiles assigned to Respondent's directors was reduced. The number of shifts in the gaming department were reduced. The advertising budget was cut. (Tr. 541-543) This effected a savings in advertising of approximately $200,000. (R. 56, lines 6-7)

On recommendation of the management consultants, the purchasing department was abolished at Tahoe. In place thereof, Respondent has a senior buyer. This resulted in a reduction of the staff from some six or eight employees to three. The director of this department was transferred from Tahoe to the Reno operations as were one or two of the better employees. Other employees were terminated and not offered other positions. (Tr. 543-544, 600-601) The Trial Examiner neglected to find that one or two employees in this department were, in fact, terminated. (R. 56, lines 14-16)

Pursuant to the recommendations of the management consultants changes were made in food inventories and portion controls. Food stores which was under the purchasing department was placed under the food department at Tahoe. As a result, inventories in food stores were reduced. (Tr. 546-547) The Trial Examiner made no finding on this.

Vice President for Administration, Andreotti, testified that in conformity with the efficiency drive his fiscal 1963-1964 budget was reduced ten per cent. In turn, his fiscal 1964-1965 budget was reduced by ten per cent. (Tr. 633-625, 628) One result of this budgetary reduction was the transfer of the director of gaming from Tahoe to the newly created post of assistant club manager at Reno. The elimination of this position resulted in a savings of $20,000 a year. (R. 56, lines 16-17; Tr. 627, 654) Cuts were made in the slot

repair department. The number of shifts in the slot repair department were reduced by reducing the workweek from six days to five days. (Tr. 652-653) By the cancellation of expenditures for training films, a savings of $12,000 was achieved. The Trial Examiner made no finding on this (Tr. 627-628, 633-634)

The Engineering and Construction Department was also reduced during fiscal 1963-1964. One assistant in this department quit and was not replaced. (R. 56, lines 19-21; Tr. 657, 665-666)

In furtherance of the cost reduction drive, supervisors were instructed to supervise for more productive work. Meetings were held with supervisors every two weeks to indoctrinate them in methods for effective productivity. The goal was to increase individual productivity and thus decrease the per unit cost. There was a drastic move instituted to reduce overtime hours throughout the organization. As a result, the Director of Industrial Relations was required to keep a wage ratio sheet for his department which gives the performance goal to be attained. He was not allowed to purchase without a purchase order, or to expend sums above a certain amount for his department without permission from his superior. In addition, he was required to submit to his superior methods for further reducing overhead. (Tr. 703-705, 732-733) There was no finding on this by the Trial Examiner.

As a result of recommendations by the management consultants, the food and beverage departments were merged. The management consultants met with the food and beverage department manager, and analyzed this department. Thereafter, the manager held a meeting with his supervisors and instructed them to cut their crews to a minimum and still render efficient service. Economies were put into effect with the result that in 1964, employees in this depart-

ment were laid off without being offered positions elsewhere in Respondent's organization. These were the scheduling supervisor, the head hostess and the head bus boy. The Trial Examiner referring to the head hostess states "the fate of the head hostess is not disclosed in the record." (R. 56, lines 24-25) If he had read the record carefully, he would have observed there was testimony and documentary evidence that she was terminated as a result of the elimination of her position and she was not offered any other job with Respondent. (RX 43; Tr. 1089-1091) The Trial Examiner further states in referring to the elimination of the three positions, "two of these persons were terminated." (R. 56, lines 23-25) Here again, had he looked at the record he would have found not only testimony but documentary evidence establishing that all three were terminated and none of them were offered other employment by Respondent. (RX 43-45; Tr. 1089-1094)

In Respondent's business office, personnel was reduced a minimum of ten per cent. While this was achieved principally through attrition, two accountants were replaced by lesser paid employees. These accountants were not offered other positions by Respondent. Although the work load in the business office increased and the workweek was reduced, there was no increase in personnel due to improved efficiency under the cost reduction program. (Tr. 1139-1140) The Trial Examiner made no finding on this.

None of these facts were controverted. Yet the Trial Examiner reaches the unwarranted inference that "an effort was apparently made to find other positions for meritorious employees." (R. 56, lines 33-35)

E. The Evidence Supports Respondent's Reason for the Layoffs.

The evidence outlined above demonstrates that the layoffs of Cole and Lovelady were part of a cost reduction in

the entertainment department which was but a part of an organization-wide cutback and cost reduction program. Reorganization, the introduction of budgeting and forecasts, the periodic reviews of actual costs as against forecasts, the periodic reviews of actual manhours as against forecasts, the stressing of economies and increased efficiency, the training of supervisory personnel in management techniques, and the better utilization of personnel were all part of the program. That the program was effective in increasing efficiency and bringing about cost reduction throughout Respondent's organization is shown not only by the testimony of various officials of Respondent, but also by the various exhibits produced at the request of the General Counsel.

The evidence disclosed that the total number of hours worked by the stage technicians during the period January through June, 1964 as compared with the same period in 1963, was reduced by 4293.5 hours. (RX 38A) Overtime hours alone during 1964, January through June, were reduced almost fifty per cent as compared to the same period for 1963. (RX 48A-F) These exhibits are the records upon which exhibit 38A is based.

For obvious reasons, these figures did not satisfy the General Counsel's representative. He requested a comparison of the hours worked by the stage technicians for the period July through December during the years 1963 and 1964. This comparison showed that for this period the total number of hours worked during 1964 was 6062.5 hours less than in 1963. (RX 38B)

Due to increased efficiency as a result of the changes instituted by the new stage manager (Tr. 1281) and the training of stage technicians to qualify them to work on

various types of equipment which they had not been able to do previously (Tr. 1369-1370), Respondent was able to make a total savings of 4293.5 man hours worked in the first six months of 1964, and 6062.5 man hours in the second six months of 1964. (RX 38A-B) Is any further proof required to show that the services of Cole and Lovelady were not needed? To ask the question is to answer it. The new stage manager testified that he found after taking the job that the biggest bulk of the shows in the South Shore Room could be operated with a smaller stage crew than previously. (Tr. 1301)

Because of this training, greater efficiency, less costly production numbers, and reduction of the hours of entertainment, Respondent was not only able to reduce the size of the crew of full time permanent stage technicians, but the remaining crew did not work as many hours as before. For example, stage technician Ponts earned $938.61 less during the first six months of 1964 than he did in the same period in 1963. (RX 39)

During fiscal 1963-1964, the entertainment department had an actual 19.5 performance factor as against 21.7 for the preceding fiscal year. Thus, there was a reduction in cost for this department in fiscal 1963-1964 as against the preceding year. (RX 53A) Again in fiscal 1964-1965, this department continued to show increased efficiency with lower actual cost as against the forecast. (RX 54)

The Board argues that the lay-offs of Cole and Lovelady were not due to lack of work because, says the Board, after the lay-offs, "the supervisors pulled cues and performed other technicians' work." (Br. 31) Not even the Trial Examiner reached such an unsupported conclusion. The evidence is to the contrary. Stage technician supervisor Vogt

testified that due to increased versatility because of training under the new stage manager and increased efficiency of the stage technicians, he had less cues to pull than he did before the lay-offs. (Tr. 1368-1370) In fact, General Counsel's witness Helderbrand contradicted the Board's theory. He testified on direct examination that supervisors only pulled cues when there was a temporary lack of sufficient personnel. As he put it, this was "not very often." He also testified that this situation prevailed even before the lay-offs. (Tr. 407-408)

It is rather interesting and characteristic of the General Counsel and the Board's case to observe that despite the plethora of charts, records and documents demanded by the General Counsel and produced by Respondent which went into evidence, the Board's brief makes no reference to them. This is understandable. They destroy the General Counsel's and the Board's theory.

IV.

RESPONDENT PROPERLY ENFORCED ITS POLICY WITH RESPECT TO TOKES FROM ENTERTAINERS

A. The Policy and the Withdrawal of Tokes.

Respondent's policy regarding tokes was contained in a booklet "You & Your Job", published in June, 1963, and distributed to all employees. The policy read as follows:

> "If you maintain Harrah's high standards of sincere friendliness, courtesy and cheerfulness, you will find that a number of *customers* will appreciate your attitude to the extent that you will be offered a gratuity, tip or 'toke'. These are acceptable and we are pleased to see you receive them if offered under the above circumstances." (RX 32, pp. 19-20; Tr. 692, 761; emphasis supplied)

Entertainers and featured performers appearing at the South Shore Room are under contract with Respondent. (Tr. 765-766) Director of industrial relations Brigham testified that gratuities, known in this industry as "tokes" are acceptable from customers of Respondent, but not from non-customers who are getting paid for a service rendered to Respondent. (Tr. 691)

In October or November, 1963, Brigham was advised by entertainment director Vincent of discontent and strong feeling among the stage crew concerning a large toke of about $800 ostensibly received by Stage Manager Lein which was not distributed among the stage crew, but which instead was used by Lein to buy a jeep for himself. (Tr. 693-694, 753-754) Vice-president of public relations France, confirmed the fact that there had been a "squabble" among the stage technicians in a belief that Lein had kept the $800 for himself. (Tr. 1040-1041) The particular production at the time was the musical, "Flower Drum Song", which had its own stage manager. It developed that in addition to performing his regular duties for Respondent, Lein was performing special tasks outside his regular duties, such as passing out the weekly checks and doing other things for the cast of this particular production. (Tr. 1040) In view of these extra duties for the cast of "Flower Drum Song", the $800 received by Lein was not a toke at all, but payment for such extra work. (Tr. 1063-1064)

Brigham discussed the matter of tokes with Lounge Supervisor Stevens who told him that it was not customary for entertainers to give tokes. Stevens emphasized the fact that it was his experience that employees who received tokes tended to govern their attitude toward the performer by the amount given. (Tr. 755, 757)

This policy of Respondent against the acceptance of tokes from persons doing contractual work for Respondent was not a new policy. It applied to all of its departments, including the entertainment department. A memorandum dated October 1, 1962, posted to the attention of all chauffeurs of Respondent, stated that it is "strictly against" Respondent's policy for any chauffeur to accept tokes from entertainers . . . violation . . . is cause for termination." (RX 42) Brigham was aware of this memorandum as well as the fact that chauffeur Rudd had been terminated in mid-1963 for violation of this policy. (Tr. 696-697, 757-760)

About December 23, 1963, to reemphasize its policy to the stage technicians, Respondent posted a notice on the bulletin board to their attention that since there had been some friction or dissension among them on the matter of tokes, they were not to be accepted, and if they were, disciplinary action would be taken. (R. 47, lines 24-29)

In addition to other reasons, Lein was terminated by Respondent because of the discontent among the stage technicians over the supposition that he had pocketed for himself a large toke. (R. 52, lines 32-35; Tr. 753-754)

Again to reemphasize the policy of Respondent and to make it crystal clear, a paragraph was added to the section regarding "tipping" in the revised edition of "You & Your Job" which issued in early 1964 to all employees in all departments. This read:

> "When a service is performed not for a customer, but for someone doing contractual work for Harrah's and when Harrah's pays the employee specifically for performing such service, no toke may be accepted by the employee performing such service." (RX 33, pp. 24-25; Tr. 694-695, 761)

As mentioned, this policy is not new or unusual as applied to the entertainment department. Brigham testified

and was corroborated by France, that a former entertainment director (Hall) had been terminated for his partiality in purchasing entertainment from particular booking agencies. (Tr. 778, 967-968) In 1960 or 1961, entertainer Tony Martin, upon completing his engagement in the South Shore Room, left four or five inscribed expensive watches with Hall for distribution to supervisors in the entertainment department. Hall was instructed by France to return the watches to Martin, which Hall did. Upon returning to Los Angeles, Martin sent the watches back. Upon instructions from Respondent's president, William Harrah, the watches were taken to a pawn shop and the money received from them was donated to a charity. (Tr. 968-970)

B. Contrary to the Board, Respondent's Policy Applied to All Departments.

1. THE TRIAL EXAMINER'S INTERPRETATION OF THE POLICY REQUIRED A FINDING OF NO VIOLATION OF THE ACT.

The Trial Examiner stated that the "publication only indirectly suggests that tokes from other than customers are outside the scope of the policy statement." (R. 51, lines 37-38) Perhaps the Trial Examiner could have more lucidly described this policy, but this is not his function. The interesting fact is that neither the Trial Examiner nor the Board found that Respondent had no policy against the acceptance of such tokes. If the publication suggests, as the Trial Examiner found, that tokes are acceptable only from customers, he should have found, as the evidence conclusively demonstrates, that tokes from other than customers were not acceptable.

Although the Trial Examiner found that the publication indirectly suggests that tokes other than from customers were not acceptable, the Board in its brief goes further. It now flatly states that nothing in the quoted language "can

reasonably be read to prohibit stage technicians from receiving tokes from performers. The handbook is simply silent on the point." (Br. p. 22) It then argues that the clarifying paragraph in the new edition of the handbook, supra, was inserted solely as a device to bar stage technicians from receiving tokes. (Br. p. 22, RX 33, pp. 24-25) Nothing could be further from the truth. Nothing in the record supports the Board's argument.

The Board also argues that significantly none of Respondent's employees outside the unit who customarily received tokes, such as dealers, bartenders, waiters and waitresses were forbidden to receive them. (Br. p. 20) The simple and direct answer is that dealers, bartenders, waiters, and waitresses perform services for customers. Tokes from customers were not prohibited. Those tokes were permitted. Tokes are not acceptable from non-customers who are getting paid for a service pursuant to contract. (RX 32, pp. 19-20; Tr. 691)

As mentioned, "You & Your Job" was distributed to employees of Respondent throughout the organization. The policy applied throughout its organization and was not specifically directed at the entertainment department or the stage technicians. For example, the engineering department enters into contracts with construction firms, the purchasing department enters into contracts; the advertising department enters into contracts; and the industrial relations department enters into contracts for group insurance. None of the employees in any of these departments are allowed to receive tokes. (Tr. 766-767)

Industrial relations director Brigham had to admonish an employee who had administered the group insurance plan, for accepting a wardrobe from the insurance agency. This incident occurred about six or nine months before the individual became Brigham's secretary. When he learned

about it, he spoke to her and questioned her as to whether she was familiar with Respondent's policy with respect to tokes, and advised her that any repetition would be cause for termination. He did not terminate her then because of the lapse of time between the event and his knowledge of it. (Tr. 771, 776-778)

France, who has served Respondent in various capacities, testified that he had always been familiar with Respondent's policy against accepting tokes from anyone under contract to Respondent. This has always been the policy of the purchasing department. When he was the credit manager for Respondent, he was familiar with this policy. (Tr. 1023-1025)

The evidence with respect to the policy on tokes throughout Respondent's departments was so overwhelming that the Trial Examiner was forced to concede, "In all other departments . . . the regulations on tipping and tokes as announced in Respondent's second booklet (RX 33, pp. 24-25) have been strictly adhered to both before and after December, 1963." (R. 52, lines 54-56)

C. Respondent Had Good Cause to Remind the Stage Technicians of Its Policy Respecting Tokes.

Respondent had good cause to post the notice to the attention of the stage technicians reiterating its policy concerning tokes. Respondent was concerned about the dissension and friction among them with respect to Lein's alleged impropriety in pocketing a large sum of money without distributing it among them.

The notice itself made no mention of the Union. Indeed, it referred to "dissension" or "friction" among the stage crew. (R. 47, lines 24-29; Tr. 235, 253) After the "Flower Drum Song" engagement ended, a rumor circulated among

the stage crew that Lein had pocketed an amount of money left by this group for the stage crew. In the words of stage technician Murray, the crew felt that this was not a "very gentlemanly" thing for Lein to do. (Tr. 1443-1444)

The Trial Examiner found it "surprising" that no action was taken as a result of the incident involving Lein until a year later. (R. 52, lines 16-17) The Board in its brief, however, admits that Respondent did not learn of this incident until October or November, 1963. (Br. p. 23; R. 52, lines 25-29; Tr. 753-754) The Board argues that there was something devious about Respondent's delay in not posting the notice until December, which oddly enough is but the month following November. (Br. p. 23) The Board conveniently ignores the fact that as a result of this dissension or friction, action was taken by Respondent against Lein, not a unit employee. Lein was terminated. (R. 52, lines 32-35; Tr. 754)

Once again, the Board intrudes into affairs not its own and substitutes its judgment for that of management's. It argues that Respondent should have ignored its own rule regarding toking and dissipated any discontent or unrest among the stage technicians by the simple expedient of telling them the money had not been for them, but for Lein alone. (Br. pp. 23-24) Perhaps Respondent could have done so, but we are not aware that an employer's failure to follow the Board's subsequent unsolicited advice is an unfair labor practice.

1. THE BOARD AND THE TRIAL EXAMINER MAKE UNFOUNDED FINDINGS AND STATEMENTS ON THIS ISSUE.

The Trial Examiner erroneously found that wardrobe mistress Greimeister, not in the bargaining unit, has received tokes since the posting of the notice. (R. p. 52, lines 37-41) The evidence, however, does not warrant such find-

ing. Greimeister received a ring from entertainer Sammy Davis, Jr. with Respondent's permission for the simple reason that she did "extra work" at home for both Davis and his family. (Tr. 926, 937-938, 941) Greimeister's principal function is caring for the chorus line. Any work that she performs for the stars or featured performers is both special and unusual and on her own time. (Tr. 937) That the stars and featured performers at Respondent's South Shore Room are aware of the policy with respect to tokes is indicated by the fact that both "Tony Martin and Connie Haynes have mentioned it to Greimeister. (Tr. 930-931) Contrary to the Trial Examiner's finding and the Board's argument in its brief (Br. p. 10), to Respondent's knowledge, Greimeister has not continued to receive tokes. It developed at the hearing that she had received a check for $50.00 sent to her at home by Tony Martin since he could not hand it to her at Respondent's premises. (Tr. 930-931)

The Board in its brief contends that Vice-President France admitted there was no rule barring stage technicians from receiving tokes until the notice was posted in December, 1963. (Br. p. 22) The fact is that France testified to the contrary and further that he was not aware that the stage technicians were receiving tokes. (Tr. 972)

The Trial Examiner failed to find whether there was an established practice of toking stage technicians in the entertainment field. He stated only that there is "evidence both for and against" such a finding. (R. 52, lines 59-61) He should have found that the burden was on the General Counsel to prove there was an established practice of toking stage technicians, which burden was not carried. The Board in its brief now goes even further and states without any warrant in the record that toking is the usual practice in the industry. (Br. p. 9)

Stage manager Bushousen, who has been in the entertainment and theatrical industry since 1950, testified there was no established custom or practice in the industry for a featured performer to toke the stage crew. Bushousen has worked in legitimate theatres, in television, for the Los Angeles Civic Light Opera, and with touring companies on the road. He has never received tokes since he has been in the business, with the exception of a "couple of times" in the early years of television. This practice in television was stopped after Bushousen returned from military service. He explained the reason it was stopped was because the crews were too big and liberties had been taken with tokes. NBC asked the performers to stop giving tokes to the stage crew. (Tr. 1286-1289) Lovelady admitted that some of the star performers do not toke at all. (Tr. 144)

The speciousness of the Trial Examiner's finding is demonstrated by the fact that there was not a scintilla of evidence before him to indicate Respondent prohibited stage technicians from receiving tokes because of their union activities. To reach such a conclusion, he relied on a record and evidence in a prior proceeding which we have discussed. (*infra* V) This led him to suspect "that following the representation election . . . Respondent was looking for some explanation for the fact that all of the stage technicians voted for the Union." (R. 52, lines 19-25) From this false premise he concluded that Respondent's action in prohibiting stage technicians from receiving tokes was "caused by and in retribution for their union activities." (R. 52, lines 49-52)

Interestingly enough, the Trial Examiner found that "Respondent has the right to discontinue this practice, but not as a retribution to the employees because of their union activities." (R. 53, lines 6-8) This places Respondent in a real quandary. It is rightfully entitled to ask, "when can it

effectuate its policy and stop stage technicians from accepting tokes?" Would Respondent be beyond the pale of suspicion if it did it today, a month from now, a year from now? The answer is obvious. This is a function of management and of no concern to the Trial Examiner or the Board. In sum, there is no substantial evidence that Respondent's policy with respect to tokes had anything to do with the union activities of the stage technicians. *Universal Camera Corp. v. NLRB, supra.*

D. The Toke Policy Is Not a Bargainable Issue.

1. THEY WERE NOT PART OF WAGES NOR TERMS AND CONDITIONS OF EMPLOYMENT.

The Board has erroneously ordered Respondent to reinstate the toke practice "as it existed prior to its discontinuance on December 23, 1963" and that it cease and desist from discontinuing the practice of receiving tokes and make no changes therein "without first discussing and bargaining with the Union on such matters." Assuming, *arguendo,* that Respondent is required to bargain with the union, it is not required to bargain concerning its policy with respect to tokes. (R. 63, lines 54-61; R. 64, lines 1-10; R. 64, lines 38-40; R. 65, lines 1-5; R. 67-68)

Tokes are not a mandatory subject of collective bargaining. Consequently, Respondent was not required to bargain with the union on that matter even if a request therefor had been made. Respondent had no control over the amount of tokes given to its employees. They were not an established part of wages nor any term or condition of employment. Whether a toke was given depended upon the generosity of a particular performer, and indeed upon the courtesy extended to the performer by the stage technicians. As stated, some performers do not toke at all. Those that do will not necessarily tip all stage technicians the same amount. (Tr.

141-142) Some performers instead of money gave stage technicians gifts such as wallets, cufflinks, cigarette lighters, key chains, tie clips and liquor. (Tr. 144, 163)

In *National L. R. Bd. v. Wooster Div. of B-W Corp.* (1958) 365 U.S. 342, 348-349, 78 S. Ct. 718, 722, a party's obligation to bargain concerning mandatory subjects of collective bargaining was defined as follows:

> ". . . Section 8(a)(5) makes it an unfair labor practice for an employer 'to refuse to bargain collectively with the representatives of his employees . . .'. Section 8(d) defines collective bargaining as follows:
>
> '(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .' Read together, these provisions establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to 'wages, hours, and other terms and conditions of employment . . .' The duty is *limited to those subjects,* and within that area neither party is legally obligated to yield. * * * As to other matters, however, each party is free to bargain or not to bargain, and to agree or not to agree." (Emphasis supplied)

See also for example: *NLRB v. Davison,* (C.A. 4, 1963) 318 F.2d, 550, 554; *NLRB v. Hod Carriers, Local 1082,* (C.A. 9, 1967) ..... F.2d ....., 66 LRRM 2333.

Subsequent to *National L. R. Bd. v. Wooster Div. of B-W Corp., supra,* the Supreme Court made it clear that it was only a refusal to bargain for an employer to make unilateral changes with respect to wages, hour, and other terms and conditions of employment without first consulting a union with which the employer was obligated to bargain. *NLRB v. Katz,* (1962) 369 U.S. 736, 737, 743, 82A S. Ct. 1107, 1108, 1111. In the latter case, the Court found that an employer's unilateral granting of a wage increase, a mandatory subject of collective bargaining under Section 8(d), was a violation of Section 8(a)(5) of the Act. In the instant case, which fact the Board would sweep under the rug, tokes are not a mandatory subject of collective bargaining.

None of the cases relied on by the Board in its brief (Br. pp. 24-25) are in point and do little to aid the Court. Each of the cases relied on by the Board involves action by an employer with respect to mandatory subjects of collective bargaining.[1]

In each of the cases relied on by the Board, the gifts or bonuses were given to the employee by the employer,

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1. *NLRB v. My Store, Inc.,* (C.A. 7, 1965) 345 F.2d 494, 497, cert. denied, 382 U.S. 927—cutting hours of employment— *NLRB v. Zelrich Company* (C.A. 5, 1965) 344 F.2d 1011, 1013-1014—withholding Christmas bonus; *NLRB v. Citizens Hotel Co.,* (C.A. 5, 1964) 326 F.2d 501, 504-505—discontinuance of Christmas bonus; *NLRB v. Toffenetti Restaurant Company, Inc.,* (C.A. 2, 1962) 311 F.2d 219, 220, cert. denied, 372 U.S. 977—discontinuance of bonus payments and disqualifying union members from participating in profit sharing; *Standard Generator S. Co. v. National Labor Rel. Bd.,* (C.A. 8, 1951) 186 F.2d 606, 607-608—withdrawal of wage increase; *NLRB v. Central Illinois Public Service Company,* (C.A. 7, 1963) 324 F.2d 916, 919—discontinuance of gas discount; *NLRB v. Wonder State Manufacturing Company,* (C.A. 8, 1965) 344 F.2d 210, 213—discontinuance of Christmas bonus; *NLRB v. United States Air Con. Corp.,* (C.A. 6, 1964) 336 F.2d 275, 277—profit sharing and Christmas bonus plans; *NLRB v. Electric Steam Radiator Corporation,* (C.A. 6, 1963) 321 F.2d 733, 736-737—Christmas bonus; *NLRB v. Exchange Parts Company,* (C.A. 5, 1965) 339 F.2d 829, 831—discontinuance of Christmas bonus.

and were tied to the remuneration which the employees received for their work so that in fact they were a part of it and in reality wages. Tokes or gifts were not given to the stage technicians by Respondent, but by performers who were under contract with Respondent. Tokes did not constitute any part of the wages paid to stage technicians. Whether they were given to the stage technicians at all was a matter over which Respondent had no control. It might have been a source of satisfaction to the stage technician to receive a toke, but this does not mean that tokes were a part of wages paid by Respondent or any term or condition of employment.

In *W. W. Cross & Co., Inc. v. NLRB,* (C.A. 1, 1949) 174 F.2d 875, 878, it was said:

> ". . . This does not necessarily mean that the word 'wages' as used in the Act covers all satisfactions, pleasures or gratifications arising from employment such as playing on a company baseball team, or attending a company picnic, or belonging to a company social club . . .
>
> * * * * * * *
>
> . . . we think it can safely be said that the word 'wages' in § 9(a) of the Act embraces within its meaning direct and immediate economic benefits flowing from the employment relationship. And this is as far as we need to go . . ."

The question whether gifts by an employer to its own employees constitutes wages or not was succinctly stated in *NLRB v. Wonder State Manufacturing Company,* (C.A. 8, 1965) 344 F.2d 210 at page 213, as follows:

> "The rule is that gifts per se—payments which do not constitute compensation for services—are not terms and conditions of employment, and an employer can make or decline to make such payments as he pleases,

> but if the gifts or bonuses are so tied to the remuneration which employees received for their work that they were in fact a part of it, they are in reality wages and within the statute. This is a question of fact, and if the Board's finding to that effect is supported by substantial evidence, the finding must be accepted on review."

In concluding in that case that the Board's finding with respect to the Christmas bonus was not supported by substantial evidence on the record considered as a whole, and that the bonus was in fact a gift about which the employer was under no obligation to bargain before discontinuing it, the Court, at page 214, discussed the following factors:

"(1) There was no consistency or regularity in awarding the bonuses . . .; (2) there was no uniformity in or basis for the amount of the bonus; (3) the bonuses were not tied to the remuneration received by the employees; (4) whether a bonus was paid and the amount thereof depended on the financial condition and ability of respondent."

We shall now apply those same factors to the instant case:

1. There was no consistency or regularity in stage technicians receiving a toke, if at all; (2) there was no uniformity in or basis for the amount of the toke; (3) tokes were not tied to the remuneration received by the stage technicians; (4) whether the stage technicians received a toke or not depended upon the generosity of the performer.

Consequently, Respondent was under no obligation to bargain with the union prior to effectuating its policy and prohibiting stage technicians from receiving tokes from performers and entertainers under contract with it.

E. The Board's Remedy with Respect to Tokes Is Beyond Its Power and Unenforceable.

Additionally, the Trial Examiner found that stage technicians generally receive in excess of $300 annually in tokes. (R. 51, lines 8-9) This finding has no support in fact since certain entertainers do not toke at all and those that did, did not necessarily give each crew member the same amount. (Tr. 141-142) In addition to money, stage technicians occasionally received other items of value, such as wallets, key chains, cufflinks, cigarette lighters, and liquor. (Tr. 77, 144, 162-163)

The Board has ordered Respondent to, *inter alia,* make the stage technicians whole "for losses of remuneration suffered by them as a result" of Respondent's "discontinuance of this [toke] practice". (R. 63, lines 54-61; R. 64, lines 1-4; R. 68) We question how Respondent can comply with such an order. How could Respondent determine whether an entertainer might toke one stage technician with $10, another with a wallet, another with a bottle of liquor, others with key chains and cufflinks, or not toke at all. The order itself is unrealistic and unenforceable to say the least.

As stated by this Court in *NLRB v. Flotill Products* (C.A. 9, 1950) 180 F.2d 441, 444:

> "The power granted the Board to direct affirmative action is remedial, not punitive . . ."

By such an order the Board has exceeded the scope of its power. Its power as expressed in Section 10(c), 29 U.S.C.A. § 160(c), is "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter."

In *Republic Steel Corporation v. NLRB,* (1940) 311 U.S. 7, 11-12, 61 S. Ct. 77, 79, the Court said:

"We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act. We have said that 'this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.' We have said that the power to command affirmative relief is remedial, not punitive. * * * We adhere to that construction."

V.

THE BOARD'S FINDINGS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

A. The Trial Examiner's and the Board's Reliance on Findings in Another Case Was Erroneous and Prejudicial.

No credible evidence of any threats of reprisal or promises of benefit was offered by the General Counsel in support of the complaint. The only evidence introduced by the General Counsel was findings by a Trial Examiner in a prior hearing relating to statements which allegedly were attributed to certain supervisors. Over the objection of Respondent (Tr. 22-29), the General Counsel requested the Trial Examiner to take judicial notice of the findings of another Trial Examiner in Case No. 20-CA-2839, reported at 150 NLRB 1702, enforced, (C.A. 9, 1966) 362 F.2d 425. The Trial Examiner not only did this but used these findings upon which to base his conclusion that Respondent was discriminatorily motivated in laying off Cole and Lovelady and in enforcing its toke policy.

We do not desire to unduly burden the Court, however, we think it would be helpful and consume less of the Court's

time, if we quoted from a portion of the transcript bearing on this:

"Mr. Paras: . . . In that decision the Board makes a number of findings, which the General Counsel feels are critical to resolution to a number of the issues presented on this hearing, and because that decision is a decision of the National Labor Relations Board, the General Counsel feels that the Trial Examiner is bound by the findings contained therein, and he draws particular reference to the findings that begin, I believe, on Page 10 of the attached decision of the Trial Examiner, which the Board adopted in toto.

"The reference there is to conversations had by a Mr. Brigham, the Industrial Relations Director for the Respondent herein, and in which I think it would be easier if I just quoted the one paragraph from the decision." (Tr. p. 22, line 25; p. 23, lines 1-12)

"Mr. Berke: Well, just a moment. I am going to object to this." (Tr. p. 23, lines 13-14)

"Mr. Paras: . . . I will not enter into an argument with respect to the matters Mr. Berke has raised, but I will join counsel to the extent that we cannot relitigate matters in the prior proceeding, but I suggest the Trial Examiner is bound no matter how Mr. Berke chooses to characterize the decision by the findings made herein by the Board, and it is the General Counsel's position that it would be improper to relitigate in this proceeding determinations make by another Trial Examiner . . ." (Tr. p. 24, lines 17-25, p. 25, line 1)

"Mr. Paras: I am centering on this because . . . General Counsel will be starting his case with two of the 8(a)(3)'s alleged in his complaint . . . the finding made or rather based thereon forms in part the predicate for the General Counsel's case with respect to all of the 8(a)(3)'s . . . and for that reason we think that this particular aspect of the decision has unique relevancy, but the whole proceeding itself or the whole decision is relevant to this proceeding, *and indeed*

this proceeding may be considered only in light of that proceeding." (Tr. p. 25, lines 20-25, p. 26, lines 1-5; emphasis supplied)

Other statements in the hearing by the General Counsel's representative also made clear that his case stood or fell on the findings in the prior hearing. For example:

"Mr. Paras: . . . but we call particular attention at this time to the findings made of statements by Mr. Brigham on October 15th and 16th following the Board election, because these statements have unique relevance with respect to the 8(a)(3)'s alleged herein." (Tr. p. 26, lines 23-25, p. 27, lines 1-2)

* * * * * * *

". . . but my point is the General Counsel need not prove again what he has already proven to the satisfaction of the Board in the prior case.

"It would be improper here for the Trial Examiner, with all due respect, to make findings in this case which are contrary to findings which the Board has already made in the prior decision." (Tr. p. 27, lines 6-12)

Again, Respondent objected: "If you are going to adopt in toto the findings suggested by the Counsel for the General Counsel and the Charging Party, I think a grievous error is going to be made." (Tr. p. 29, lines 3-5)

The Trial Examiner in making his ruling to go along with the General Counsel, said:

"I will take judicial notice of the Board's decision and findings in the case of Harrah's Club, reported at 150 NLRB No. 169 . . .

"So, it will not be necessary to relitigate matters which the Board itself has found to have occurred or to have existed." (Tr. p. 29, lines 14-21)

A substantial part of the decision of the Trial Examiner is devoted to quotations of alleged statements by super-

visors and management personnel of Respondent taken from the previous decision. (R. 49, lines 28-34; R. 49, lines 36-53; R. 49, lines 55-60; R. 50, lines 1-5; R. 50, lines 7-19; R. 50, lines 21-29; R. 50, lines 31-44; R. 50, lines 46-50; R. 50, lines 52-59)

The Trial Examiner did not have the witnesses before him in this proceeding to testify to such alleged statements in order to observe their demeanor and to make an objective appraisal of their credibility. Consequently, the Trial Examiner erroneously permitted the alleged findings in the previous case to control his judgment of this case. As a result, he entertained a prejudicial view of this case and all evidence offered by Respondent.

No evidence of anti-union motivation was offered by the General Counsel in this case to support the lay-offs of Cole and Lovelady, the alleged refusal to bargain or Respondent's policy on tokes. However, when the Trial Examiner read the previous decision, he was able to surmise that Respondent in prohibiting stage technicians from accepting tokes "was looking for some explanation for the fact that all of the stage technicians voted for the union." (R. 52, lines 24-25) From this inference, it was apparently easy for the Trial Examiner to then conclude that the Respondent's action "was caused by an in retribution for their (stage technicians) union activity." (R. 52, lines 49-52)

With respect to the lay-offs of Cole and Lovelady, the Trial Examiner, in reliance upon the alleged findings in the previous case, disregarding the evidence offered by Respondent in this case, concluded that Respondent was retaliating against the employees for voting for the Union. (R. 52, lines 28-32) Where lay-offs occurred in other departments, the Trial Examiner without bases or substan-

tiation, as we have shown, inferred that "apparently" an effort was made to find other positions for meritorious employees. (R. 56, lines 34-36) When Cole was offered temporary work a week after his lay-off, the Trial Examiner again without bases or substantiation, concluded that "apparently the need for his services was not carefully considered." (R. 56, lines 45-46) Obviously, he was not only indulging in unwarranted inferences, but was substituting his thinking and managerial expertise for that of management. Although conceding that Respondent was cost conscious, the Trial Examiner was quick to allude to the previous case and conclude that Respondent was also "anti-union conscious." (R. 57, lines 42-45) To support his conclusion that Cole and Lovelady were laid off for union activities, the Trial Examiner again quotes at great length from the alleged findings in the previous case. (R. 57, lines 47-61; R. 58; lines 1-6)

The Board in its brief to the Court, quotes extensively from the decision in the previous case since it has no evidence to rely on in this case. (Br. pp. 4-7) Relying on the previous decision, it argues that Respondent's "openly expressed hostility toward the Union" presents a "*prima facie* case of illegal discrimination . . ." (Br. p. 28) It follows the same boot-strap argument of the Trial Examiner. There being nothing in the instant record to support its argument, the Board refers to the record in the previous case to contend that Respondent's "hostility to the Union evident before the election was now transformed into resentment and vindictiveness towards the stage crew responsible for the Union's victory." (Br. pp. 18-19)

In a vain effort to show some relation to the election and Respondent's policy respecting tokes, the Board in its brief refers to the fact that the notice with respect to tokes was posted to the attention of the stage technicians on

December 23, 1963, "about five weeks" and "a few weeks" after the Regional Director issued his report recommending dismissal of Respondent's objections to the election. (Br. pp. 9, 20) The obvious inference that the Board would have the Court draw is that the Regional Director's report influenced Respondent's "timing" in posting this notice. However, the date is insignificant. The Regional Director's report was not a final action by the Board. Respondent filed exceptions to the Regional Director's report on December 1, 1963. (GCX 2(f)) The Board's decision and certification of representatives did not issue until February 27, 1964. (GCX 2(g); R. 46, lines 53-55; R. 47, lines 1-8)

Such error by the Trial Eaminer and the Board has worked substantial prejudice to the rights of Respondent. *NLRB v. Bill Daniels, Inc.* (C.A. 6, 1953) 202 F.2d 579, 586-587, reversed on other grounds, 346 U.S. 918, 74 S. Ct. 305; cf *NLRB v. Johnson,* (C.A. 6, 1962) 310 F.2d 550, 552. In addition, it is contrary to the *Administrative Procedure Act,* Title 5, U.S.C. § 1006(d) recently recodified as 5 U.S.C. § 556(e). As a consequence, there is no substantial probative evidence in this record, independent of the Board's taking judicial notice of another Trial Examiner's findings in a prior case, to support the Board's findings in the instant case. *Universal Camera Corp. v. NLRB,* (1951) 340 U.S. 474, 71 S. Ct. 456.

In *NLRB v. Bill Daniels, Inc., supra,* the Court said:

> "It is the general rule that a Court ordinarially will not, either upon its own motion or upon suggestion of counsel, take judicial notice of records, judgments and orders in other and different cases or proceedings, even though such cases may be between the same parties and in relation to the same subject matter."

In its brief in opposition to a petition for a writ of certiorari, in *Winn-Dixie Greenville, Inc. v. N.L.R.B.,*

(1967) ..... S. Ct. ....., the Board during the current session of the United States Supreme Court in referring to the issue raised concerning the Board's reliance on its decisions involving the employer's past conduct to support an unfair labor practice finding, said:

> ". . . although it [history of past conduct] alone could not support an unfair labor practices finding, may be utilized to shed light on other probative evidence."[2]

Thus, the Board, when faced with the issue in the Supreme Court, recognized the limited use to which prior findings could be put in a current case involving the same employer. In the instant case, there was no "other probative evidence". The sole "evidence" utilized by the Trial Examiner and the Board was the findings of a Trial Examiner in a prior case.

B. Assuming, Arguendo, the Statements Found in the Prior Case Were Made They Do Not Support a Finding of Discrimination in This Case.

Even assuming the statements relied on by the Trial Examiner and the Board were made, they were made so remote in time from the violations alleged herein, that there is no relationship between them.

In *Paramount Cap Manufacturing Company v. NLRB*, (C.A. 8, 1958) 260 F.2d 109, 112, the Court said:

> "Hostility toward the Union was not in itself an unfair labor practice and a presumption that such state of mind once proven was presumed to continue did not shift the burden of proving the alleged unfair labor practice but was proper background evidence in this case."

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2. For the convenience of the Court we have had the Board's brief in that case reproduced and are filing it with the court simultaneously herewith. See page 7 thereof.

This Court in *NLRB v. Citizens-News Co.,* (C.A. 9, 1943), 134 F. 2d 970, 973, held that "the mere discharge of an employee with or without reason is therefore not evidence of intent to affect labor unions or the rights of employees under the National Labor Relations Act." Similarly, *NLRB v. Late Chevrolet Co.,* (C.A. 8, 1954), 211 F.2d 653, 656; *NLRB v. Falls City Creamery Co.* (C.A. 8, 1953) 207 F.2d 820, 829.

In *NLRB v. Council Manufacturing Corp.* (C.A. 8, 1964), 334 F.2d 161, a plant manager allegedly stated that the owner would close down the plant or automate it "before we have a union here." The Court denying enforcement of the Board's order, said (165):

> "We regard this disputed testimony, despite its creditation by the trial examiner and by the Board, and despite its characterization in the Board's brief as 'an obvious violation', as too thin a crust on which to rest anything as serious as an 8(a)(1) violation. We have the impression that the Board of late has tended to overstretch on this type of issue and that, in the light of Universal Camera, a foundation of much greater substance is required. . . ."

NLRB v. Johnnie's Poultry Co., (C.A. 8, 1965), 344 F.2d 617, in which the employer is alleged to have said the union would try to organize the plant but he could not afford to pay union wages and would shut down rather than have a union. The court, at 619, held:

> "At most, the challenged statement is an isolated incident made in a friendly conversation more than a month before the organizational campaign commenced. We have denied enforcement in similar situations . . ."

The Trial Examiner piled inference upon inference to find a violation of the Act with respect to the lay-offs and

the toke policy. He inferred that it was not necessary, as a part of Respondent's cost reduction program, to make any changes in its entertainment department and in particular to lay off any stage technicians. (R. 57, lines 10-11) Next, the Trial Examiner inferred that Cole and Lovelady, both of whom had the least seniority, were selected among other stage technicians for lay-off because of their union activities. (R. 57, lines 47-53) We submit that such inferences are unwarranted and are no substitute for "substantial evidence on the record considered as a whole". *Universal Camera Corp. v. NLRB, supra; NLRB v. Sebastopol Apple Growers Union,* (C.A. 9, 1959), 269 F.2d 705, 713. There is no substantial evidence on the record considered as a whole that the lay-off of Cole and Lovelady was due to union activities. Indeed there is not a scintilla of evidence in this record that it was due to union activities. To the contrary, the evidence as has been shown, is overwhelmingly that their lay-off was for valid economic and business reasons.

C. Neither the Trial Examiner Nor the Board May Second-Guess Management.

To reach his conclusion, the Trial Examiner had to go beyond the record before him, rely on alleged statements in a previous record, discussed above, and substitute his own business judgment for that of Respondent's.

Contrary to the finding of the Trial Examiner, the lay-off of Cole and Lovelady was not "ordered by top management without consideration of the needs of the department." (R. 57, lines 10-11) The decision to lay off the stage technicians was not made by the vice-president responsible for the entertainment department. The producer, the stage manager, and the entertainment director made the recommendation to him that they could get by with fewer stage hands. He acted upon their recommendation. (Tr. 994-955)

The Trial Examiner was completely mistaken when he said that "France [Vice-President] did not take into account the personnel requirements of the stage crew." (R. 57, lines 18-19)

The evidence of economy moves by Respondent was apparently so overwhelming, the Trial Examiner was compelled to find that "a reduction in the total number of stage technicians would have come about at some point." (R. 58, lines 31-33) However, this finding is directly contrary to and inconsistent with the conclusion that he was endeavoring to reach. Rather than consider the record evidence before him, the Trial Examiner substituted his judgment for the business judgment of Respondent by concluding that any further reduction of stage technicians would have been accomplished by attrition or by the reassignment of stage technicians to other positions. (R. 58, lines 37-42) There is no evidence to support this conclusion. The evidence discussed previously establishes that there were personnel reductions in other departments not accomplished by attrition or by reassignment.

A further illustration of the substitution by the Trial Examiner of his business judgment for that of Respondent and from this leaping to the conclusion Respondent's actions were discriminatorily motivated, is found in his finding relating to the lay-off of the assistant stage manager. To the Trial Examiner it "seem[ed] a rather inept time to lay off the assistant stage manager . . ." (R. 57, lines 27-31) As this Court said in *NLRB v. Sebastopol Apple Growers Union,* (C.A. 9, 1959), 269 F.2d 705, 713-714:

> "The Trial Examiner might have operated the cannery differently. But the respondent had the right to determine for itself how its business was to be conducted. Management may make wise decisions or stupid ones, and it is of no concern of the Board unless they are unlawfully motivated."

Obviously, the Trial Examiner here fell into the same classic error of purporting to evaluate Respondent's actions in terms of reasonableness. The fallacy of this has been repeatedly exposed. *NLRB v. McGahey,* (C.A. 5, 1956), 233 F.2d 406, 412; *NLRB v. Wagner Iron Works,* (C.A. 7, 1955), 220 F.2d 126, 133; *NLRB v. Montgomery Ward & Co.* (C.A. 8, 1946), 157 F.2d 486, 490.

D. The Board Ignores the Applicable Standards of Judicial Review.

These were not the only errors of the Trial Examiner in this respect. We have already noted some of the extreme lengths to which the Trial Examiner and the Board went to ignore evidence that runs counter to their conclusions. The Board's brief reflects this approach and it is not one that lends weight to its findings or that makes the task of the Court easier in exercising its reviewing functions. The Trial Examiner neglected, among other failures of his as we have earlier pointed out, to find as the evidence shows, that under Respondent's cost reduction program, the job of lounge manager was combined with that of entertainment director; that when Ponts quit, both Lovelady and Cole in the order of seniority were offered Ponts' full time permanent job which they refused. (R. 58, lines 42-43)

It is obvious, too, that the Board has ignored certain fundamental legal propositions. The burden is on the General Counsel to prove affirmatively by substantial evidence that a discharge was due to union activities and the employer does not have to prove non-discrimination. As stated in *Indiana Metal Products Corp. v. NLRB,* (C.A. 7, 1953) 202 F.2d 613, 616:

> "This burden of the Board to prove discrimination and to prove that discrimination was employed in the hiring or firing of a man because of his union activities does not shift from the Board."

Similarly, *NLRB v. Sebastopol Apple Growers Union, supra,* at p. 712.

The controlling case on the scope of review is, of course, *Universal Camera Corp. v. NLRB, supra.* Since that decision, the courts have taken the view that it is their "duty to consider not only evidence tending to support the Board's findings but also evidence conflicting therewith."[3] "And if it is our duty to consider it then we must pass upon its weight."[4]

While there is no formula for ascertaining substantial evidence, certain principles have developed in addition to the one of considering the evidence on both sides:

(a) Substantial evidence must be more than suspicion.[5] Typical of suspicion is the Trial Examiner's and the Board's conclusion that the reduction of the stage crew could have been handled by attrition. Yet there was no evidence of any member of the stage crew intending to quit at the time. Another example of suspicion is the timing of the lay-off of the assistant stage manager which the Trial Examiner said was "a rather inept time." (R. 57, lines 27-31; R. 58 lines 37-42)

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3. *NLRB v. Gala-Mo Arts, Inc.* (C.A. 8, 1956), 232 F.2d 102, 105; *Osceola Co. Co-op Cream. Ass'n. v. NLRB* (C.A. 8, 1958), 251 F.2d 62, 64; *NLRB v. Englander Company* (C.A. 9, 1958), 260 F.2d 67, 70; *NLRB v. Hart Cotton Mills* (C.A. 4, 1951), 190 F.2d 964, 974-975; *NLRB v. McGahey, supra,* 233 F.2d at 413.

4. *United Packinghouse Workers of America, CIO v. NLRB* (C.A. 8, 1954), 210 F.2d 325, 330. Compare *NLRB v. West Point Mfg. Co.* (C.A. 5, 1957), 245 F.2d 783, 786: "In each case it must be established whether the legal or the illegal reason for discharge was the actually motivating one, and if evidence of both is present we must ascertain whether the evidence is at least as reasonably susceptible of the inference of illegal discharge drawn by the Board as it is of the inference of legal discharge."

5. *Universal Camera Corp. v. NLRB, supra,* 340 U.S. at 477, 71 S. Ct. at 459.

(b) The pyramiding of inferences does not constitute substantial evidence. Startling illustrations of such pyramiding were discussed *supra*. The whole chain of inferences does not rest on a single piece of evidence. It begins with an assumption, not based on any testimony or any other credible evidence that it was not necessary in connection with its cost reduction program for Respondent to reduce its stage crew, then nimbly leaps to the conclusion that even if it was necessary, it could have been handled by attrition. This, too, without a shred of evidence. Then the great leap is made that *ergo* the lay-offs were for union activity.

(c) "The fact that a discharged employee may be engaged in labor union activities at the time of his discharge, taken alone, is no evidence at all of a discharge as the result of such activities.[6] And, as the Court said in *NLRB v. McGahey, supra,* 233 F.2d at 413:

> "With discharge of employees a normal, lawful legitimate exercise of the prerogative of free management in a free society, the fact of discharge creates no presumption, nor does it furnish the inference that an illegal—not a proper—motive was it cause. An unlawful purpose is not lightly to be inferred. In the choice between lawful and unlawful motives, the record taken as a whole must present a substantial basis of believable evidence pointing toward the unlawful one."

In the instant case there were no discharges. Cole and Lovelady were laid off with the assurance they would be recalled when needed. They were recalled when needed and when offered full time permanent employment refused to accept it. Neither was there any evidence that they were

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6. *NLRB v. Citizen News Co.* (C.A. 9, 1943), 134 F.2d 970, 974; *Osceola County Co-op Cream Ass'n v. NLRB, supra; NLRB v. Montgomery Ward & Co., supra.*

engaged in union activity at the time of their lay-off. *A fortiori, NLRB v. McGahey,* supra.

(d) Finally, it is of critical importance to bear in mind that "a finding of 8(a)(1) guilt does not automatically make a discharge an unlawful one or, by supplying a possible motive, allow the Board, without more, to conclude that the act of discharge was illegally inspired."[7] Here the Trial Examiner and the Board rely heavily and solely on 8(a)(1) findings made by another Trial Examiner in another case. The alleged 8(a)(1) violations in the other case took place many months before the lay-offs. Clearly, the Board has gone far afield to predicate an 8(a)(3) violation on such evidence. Even if there had been 8(a)(1) violations at the time of the lay-offs, such violations could not be relied on to conclude the lay-offs were illegal. The two must be kept separate: "We have frequently sustained 8(a)(1) charges while rejecting those under 8(a)(3)."[8]

The Trial Examiner's emphasis on "timing" to support his conclusion that the lay-offs were discriminatory was succinctly disavowed by this Court in *NLRB v. Citizen-News Co.,* (C.A. 9, 1943) 134 F.2d 970, 974:

> "The fact that a discharged employee may be engaged in labor union activities at the time of his discharge, taken alone, is no evidence at all of a discharge as a result of such activities. There must be more than this to constitute substantial evidence."

In sum, suspicion by the Trial Examiner that the lay-offs were for union activity is no substitute for substantial evidence. As the Court enunciated in *NLRB v. Citizens-News Co., supra* (at 974):

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7. *NLRB v. McGahey, supra,* 233 F.2d at 410, and cases there cited.

8. *NLRB v. McGahey, supra,* 233 F.2d at 410, and cases there cited.

> "Circumstances that merely raise a suspicion that an employer may be activated by unlawful motives are not sufficiently substantial to support a finding."

In the very recent case of *Crawford Mfg. Co. v. NLRB* (C.A. 4, Oct. 27, 1967) ..... F.2d ....., 66 LRRM 2529, the Board was held not warranted in finding a discriminatory lay-off of eight employees the day following arrangements for a consent election. The Court, at 66 LRRM 2530, stated:

> "The Board rejects the justification offered by the company, particularly in view of the union sympathies of the men and the anti-union disposition of the employer. However, we see no acceptable basis for this discredit of the company. Its officers testified to the business slump and cited company records in corroboration. We discern no falsification here. Even if mistaken, it was a managerial judgment not impeached as mala fide."

The Board itself has held, despite a finding of anti-union animus, that an employer did not violate the Act by laying off two employees, even though they were union members, since the lay-offs were compelled by business reasons and the employees were selected on the basis of their low seniority. *H. W. Elson Bottling Co.,* (1965) 155 NLRB 714.

E. Lovelady Is a Supervisor Within the Meaning of the Act and Therefore Not Entitled to the Protection of the Act.

Assuming, *arguendo,* that the lay-off of Lovelady was because of his union activity, there was no violation of the Act because he is a supervisor within the meaning of Section 2(11) of the Act. A supervisor does not have the protection of the Act. *NLRB v. Fullerton Publishing Company* (C.A. 9, 1960), 283 F.2d 545, 551. The evidence, contrary to the finding of the Trial Examiner (R. 55, lines 33-47), conclusively demonstrates that Lovelady was a supervisor as defined by the Act.

Lovelady testified, on *direct examination,* that in the winter of 1962 or the early spring of 1963, Sy Lein, then stage manager, assembled the entire stage crew and announced that from that time forward Lovelady was "assistant stage manager" and that the stage crew should "act accordingly". He also testified that as assistant stage manager he supervised "to a degree the other stage hands." (Tr. 50-52, 92-93) Lovelady was given a pay raise at this time and occupied this position until his layoff. (Tr. 50, 52, 92) Here again, the Trial Examiner neglected to make these findings, although he was quick to conclude that the contention Lovelady was a supervisor was "without merit." (R. 55, lines 33-48)

As assistant stage manager, Lovelady supervised approximately nine stage technicians. He relieved Stage Manager Lein during his day off, and at other periods when he was absent, at which times he had the complete authority of the stage manager with the exception that he could not sign time slips. When Lein left at night Lovelady was in sole authority over the crew. (Tr. 92-95) In addition, he scheduled the days off for other stage technicians, gave orders and instructions to stage technicians in the performance of their duties, assigned stage technicians their cues, prepared cue sheets used by both himself and the stage manager to give cues to the stage technicians, and made "strikes" for the closing of a show and the opening of a new show. (Tr. 50-53, 92-95, 135-137)[9] Lovelady understood at the time he was made assistant manager that the stage crew was to respect his orders and instructions. (Tr. 93)

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9. A "strike" means tearing down one scene in a show in order to get ready for a new scene and setting up the new scene. Lovelady also testified that he and the stage manager would determine how the strike "would be done and let the crew know how they would do it." (Tr. 52).

It is evident, based upon Lovelady's own testimony, that he had the authority to responsibly direct the stage technicians working under him. It is axiomatic that under the Act an individual need have only one of the powers described in Section 2(11) to be a supervisor even though he satisfied none of the other criteria.

Research Designing Service, Inc. (1963), 141 NLRB 211, 213, where the Board although finding the individuals involved had no authority to hire, discharge or effectively recommend such action, found they were supervisors in assigning men to jobs, and held "an individual to be a supervisor within the meaning of the Act need have only one of the indicia of a supervisor enumeratd in Section 2(11) of the Act." Similarly, *NLRB v. Edward G. Budd Mfg. Co.* (C.A. 6, 1948), 169 F.2d 571, 576, cert. den., 335 U.S. 908, the provisions in Section 2(11) must be construed in the disjunctive; *Ohio Power Co. v. NLRB* (C.A. 6, 1949), 176 F.2d 385, 387. See also *NLRB v. Leland-Gifford Co.* (C.A. 1, 1952), 200 F.2d 620, 625.

VI.

THE TRIAL EXAMINER, CONTRARY TO THE BOARD, CORRECTLY CONCLUDED THAT COLE AND LOVELADY REJECTED RESPONDENT'S VALID OFFER OF REINSTATEMENT.

A. The Offer to Cole.

After being laid off on January 19, 1964, Cole was recalled for temporary work a week later. He worked for one day. He was again called back to work on that occasion during which he received approximately $1,000. That work ended on March 5, 1964, which was the last time he worked for Respondent. (R. 56, lines 39-48; Tr. 152-154, 166) Cole was again offered temporary employment on May 7, 1964, which he refused, on the ground that he could not leave steady employment for spasmodic work. (RX 8) He was

again offered employment for two weeks on June 23, 1964. (RX 9) He refused this on the ground that he had steady employment at a higher salary and could not afford to move back to Lake Tahoe for two weeks' work. (RX 10)

When stage hand Ponts resigned from the stage crew on July 1, 1964, and after Lovelady had rejected Respondent's offer of full-time permanent employment, Cole was offered by telegram a full-time permanent position on the stage crew. (RX 11) The telegram read as follows:

> "The resignation of Dick Ponts opens full-time position on stage crew. Will you report for work by Sunday, July 5, latest. Please answer via Western Union immediately."

On July 4, Cole sent the following telegram to Respondent (R. 47 n. 3; Tr. 170; RX 12):

> "Physically impossible to give three days notice to present employer, lease our home here, move furniture and find apartment in Tahoe in July. Thanks for the offer, but cannot accept at this time. Would need at least four weeks to prepare."

In addition to working in San Francisco, Cole was managing an apartment building that he owned in California at the time. (Tr. 165-166)

The Trial Examiner concluded that Cole did not ask for or indicate he would accept employment in a reasonable period. He found the four week period Cole stated he would need to prepare to be unreasonable and concluded that Cole had rejected Respondent's offer of July 1, 1964. (R. 47, n. 3)

B. The Offer to Lovelady.

After being laid off on March 5, 1964, Lovelady was assured by Respondent that he would be called back when his services were needed. (Tr. 67-69)

Following his layoff, Lovelady received an offer for two weekends' employment by Respondent, which he rejected. (Tr. 82-84) Subsequently, on June 21, Lovelady received another offer of employment by Respondent for two weeks' work commencing June 23. (R. 59; Tr. 81-84; GCX 5) This, too, was rejected by him on the following day giving the reason that his father had passed away, and he must stay in San Diego under the circumstances and concluding, "Do not count on me." (48; Tr. 84-85; GCX 6)

When Ponts resigned, he attempted without success to contact Lovelady to let him know there would be a vacancy due to his quitting. (Tr. 919-920) Upon Ponts' resignation, Respondent, in the order of seniority, first offered Lovelady a full-time position on the stage crew. (R. 48; Tr. 86; 100-101; GCX 7) Respondent's telegram sent on June 26 requested Lovelady to reply by telegram immediately. Lovelady refused the offer by telegram on July 3, 1964, which stated (R. 48, n. 5; Tr. 86-87, 100-101):

> "No mention of unconditional reinstatement or backpay. The answer is no. This reply doesn't in any way forfeit any backpay due me."

Lovelady, who was working in San Francisco at the time, testified that he refused this offer because Respondent was not "making any amendments (sic) or saying they were wrong." (Tr. 100-101) The Trial Examiner found that Lovelady's answer constituted a rejection of a valid offer of reemployment. (R. 48 n.5)

C. The Board's Finding Is Unsupportable.

Differently than the Trial Examiner, the Board did not regard the failure of Cole and Lovelady to request a reasonable extension of the reporting time "as evidence that the proposed reporting dates did not influence their rejec-

tion of these offers". Such inference is unsupported by the record. The Board concedes that the telegrams sent by Respondent to Cole and Lovelady indicated "proposed" reporting dates. (R. 85, n.1) Rather than engage in a dissertation on contract law regarding counter proposals, as the Board suggests, this issue might not be before this Court if Cole did not make an unreasonable request and if Lovelady did not flatly reject Respondent's offer. Neither indicated any desire to return to work for Respondent or thereafter requested reinstatement.

The basis for the Board's holding is not as clear to Respondent as it appears to be to the Board. There is no contention by the Board that the offers were not unconditional and not made in good faith. The argument of the Board appears to be that Cole and Lovelady were not given a reasonable period of time within which to report and hence the offers were invalid.

We shall not dwell at great length on the cases cited by the Board in its brief. (Br. 35-36) They are just not applicable. Only *Fred E. Nelson, etc.,* (1953) 102 NLRB 780, 783 and *Thermoid Co.,* (1950) 90 NLRB 614, 615-616 refer to the time for reporting. In *Nelson,* an employee was given only one day to report for work. The Board found that the offers were not in good faith since the employer by letters, which distorted the facts, attempted to prevent the employees from receiving unemployment compensation. In *Thermoid, supra,* the offer was "conditioned" on the employee returning within four days. Lack of good faith, however, was demonstrated by the fact that the employer advised the employee that the offer was being made since it appeared that he was no longer a member of the union. There is no evidence in the instant case that the offers were not made in good faith by Respondent, and the Board made no finding that there was a lack of good faith.

The Board's brief makes no mention of a host of decisions which support Respondent and the Trial Examiner. In *White Sulphur Springs Company v. NLRB,* (C.A.D.C., 1963) 316 F.2d 410, 415, the Court reversed the Board's finding that the employer held open its offer of reinstatement for "an unreasonably short time". Offers of reinstatement were made to the employees in that case on a Saturday and on the following Monday, with Monday noon being the deadline for acceptance. The Board argued that the offers must as a matter of right be held open until the employee's union decided whether or not they were to be accepted. In reversing the Board, the Court said:

> "The law required the employer to do no more than it did on Saturday morning."
>
> * * * * * * *
>
> "From the beginning Monday noon had been fixed as the deadline for decision. The employer certainly was entitled to know where it stood . . ."

For some unexplained reason, the Board chooses not to bring to the Court's attention previous decisions of its own concerning reporting time. In *Nevada Tank & Casing Co.,* (1961) 131 NLRB 1352, 1353, a written offer to employees to reply or report for work within forty-eight hours was held to be a valid offer of reinstatement. In *Nashville Display Co.,* (1951) 93 NLRB 1310, individual registered letters to laid off employees requesting them to report at the beginning of the next workweek was held a valid offer of reinstatement.

Cole's reply that he would "need at least four weeks to prepare" amply supports the conclusion reached by the Trial Examiner that Cole rejected Respondent's offer made in good faith and that no further offer need be made by Respondent. An unreasonable request by the offeree constitutes a rejection of a valid offer of reinstatement. *V.L.B.*

Hosiery Co., Incorporated, (1952) 99 NLRB 630. It can be as readily and certainly more reasonably, inferred that Cole was influenced to reject Respondent's offer due to the fact that he was working in San Francisco and was managing an apartment building that he owned in California at the time, as for the Board to infer that Cole was influenced by the reporting date. If the offeree would not accept the offer since he had already obtained satisfactory employment, no further offer is necessary even though an invalid condition might have been attached to the offer. *National Labor Rel. Bd. v. L. Ronney & Sons Fur. Mfg. Co.,* (C.A. 9, 1953) 206 F.2d 730, 737-738.

Lovelady's rejection of the offer is more emphatic. He was also gainfully employed in San Francisco at the time he received Respondent's offer. He did not protest that he was not afforded sufficient time to report. Lovelady's rejection of Respondent's offer was conditioned upon the receipt of "back pay" and an "apology". (R. 48; Tr. 100-101) An unconditional offer of reinstatement is not ineffective merely because certain unfair labor practices have not been remedied at the time the offer is made. *Hock & Mandel Jewelers,* (1963) 145 NLRB 435, 436; *Knickerbocker Plastic Co., Inc.,* (1961) 132 NLRB 1209, 1236; *Kitty Clover, Inc.,* (1953) 103 NLRB 1665, 1667.

CONCLUSION

For the reasons stated, we are confident that a review of the whole record and of the applicable law will lead the Court to conclude that the Board's petition for enforcement must be denied. We so urge.

Dated: December 19, 1967.

Respectfully submitted,

SEVERSON, WERSON, BERKE & BULL
NATHAN R. BERKE

By: NATHAN R. BERKE

Attorneys for Respondent

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

NATHAN R. BERKE

Attorney